

**U.S. Department of Labor**

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**Issue Date: 30 October 2008**

**CASE NO.: 2008-MSA-00001**

**In the Matter of:**

**ICG EASTERN, LLC,  
(BIRCH RIVER MINE, MINE ID 46-07945)  
Petitioner,**

**v.**

**MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),  
Party Opposing Petition.**

Appearances:	Mark E. Heath, Esq. Brian J. Warner, Esq. For the Petitioner	Joshua P. Falk, Esq. For the Respondent
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Before:	William S. Colwell Associate Chief Administrative Law Judge
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**DECISION AND ORDER GRANTING  
PETITION FOR MODIFICATION**

This proceeding arises under Section 101(c) of the Federal Mine and Safety Health Act of 1977 ("Act" or "Mine Act"), 30 U.S.C. §§ 811(c), and its implementing regulations at 30 C.F.R. Part 44. Congress adopted the Mine Act "to protect the health and safety of the Nation's coal or other miners." 30 U.S.C. § 801(g). It requires the Secretary of Labor to develop detailed mandatory health and safety standards to govern the operation of the Nation's mines. 30 U.S.C. § 811. International Coal Group Eastern, LLC ("ICG" or "Petitioner") filed a petition for modification of the application of the mandatory safety standards of 30 C.F.R. § 77.501 as pertains to the Birch River Mine in Webster County, West Virginia.

The following decision is based upon a consideration of the entire record and states all facts officially noticed and relied upon as required by 30

C.F.R. § 44.32(b). The decision is made on the basis of a preponderance of all available, reliable and probative evidence.

### **Statement of the Case**

On January 24, 2007, ICG Eastern, the owner and operator of the Birch River Surface Mine, filed a petition for modification of the application of 30 C.F.R. § 77.501 to the Birch River Mine to allow two electricians to work in tandem via radio communication while conducting electrical repairs on the mine dragline (Joint Exhibit 3). The petition alleges that the proposed alternative method will at all times provide the same measure of protection as the standard of § 77.501, as laid out below.

The mandatory safety standard of § 77.501 requires that the same qualified electrician who is performing electrical repairs on the dragline also lock out and tag the disconnecting device. Specifically, § 77.501 states:

No electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by persons authorized by the operator or his agent.

ICG has asked the Secretary of Labor, through its delegate to the Mine Safety and Health Administration, to grant its petition for modification of the safety standard. The standard is intended to protect miners from electric shock, which may come from one employee accidentally re-energizing a piece of equipment the miner is working on.

The U.S. Department of Labor, Mine Safety and Health Administration ("MSHA") personnel conducted an investigation into the merits of the petition and filed a report on June 15, 2007, of their findings and recommendations with the Administrator for Coal Mine Safety and Health. MSHA's investigation revealed that similar petitions had never been applied for by dragline operators and MSHA had not granted similar modifications in the past. After a review of the entire record, the Acting Deputy Administrator for Coal Mine Safety and Health, issued a *Proposed Decision*

*and Order* on November 26, 2007, denying the petition. The decision concluded that ICG's proposed method would not at all times guarantee no less than the same measure of protection afforded the miners under 30 C.F.R. § 77.501.

ICG appealed the *Proposed Decision and Order* on December 21, 2007, contending that the Deputy Administrator's findings are not supported by fact and law. A hearing on the appeal was held before the undersigned on June 18, 2008 in Charleston, West Virginia.

### **Findings of Fact and Conclusions of Law**

#### **I.**

The Birch River Mine, which began operation in April 1992, is located in Webster County, West Virginia. The Birch River complex consists of a surface mine, preparation plant, overland conveyor, clean coal silo, and railroad loadout. ICG Eastern, Inc. purchased the Birch River Mine in October 2004. The mine currently employs 247 individuals. Forty-two million cubic yards of overburden are removed annually, and 2.5 million to 3.3 million tons are produced annually. The Birch River Mine uses dragline, excavator, wheel loaders, dozer push, and blast cast. Approximately 28% of the mine's production is via dragline.

The Bucyrus-Erie 1570 Dragline was first used for mining at the Birch River Mine in November of 1998. The dragline is operated 24 hours a day, seven days a week, and is down one preventative maintenance shift per week. In a letter dated May 27, 1998, Mr. Eugene Brown, Safety Manager for Evergreen Mining Company (predecessor to Petitioner), submitted a request to modify West Virginia Surface Mine Regulation Title 56-3-37. This state statute, like 30 C.F.R. §77.501, requires disconnecting devices to be locked out and suitably tagged by the person who performs the electrical work. On September 14, 1998, Mr. Brown received a variance ("TRC waiver") from the appropriate state agencies, provided that Evergreen adhered to the eight stipulations listed in the letter. Evergreen did not seek a similar modification from MSHA and electrical work on the dragline at the Birch River Mine was conducted pursuant to the TRC waiver from the state of West Virginia. When electrical work was performed on the dragline, one certified electrician locked and tagged out the disconnecting device at the electrical substation and another certified electrician performed the electrical work. When power needed to be restored, the substation electrician removed his lock and tag from the disconnecting device and re-energized the system for the other electrician. These individuals communicated via

hand-held radios and were required to follow the steps outlined in the TRC waiver.

The Petitioner continued to operate under the terms of the TRC waiver until March of 2006. At this time, there was an electrical accident on the dragline. During the subsequent investigation, MSHA discovered that Petitioner was performing electrical work on the dragline in violation of 30 C.F.R. § 77.501. On January 24, 2007, pursuant to MSHA's enforcement of the standard, Petitioner submitted the Petition for Modification at issue in this case.

ICG has petitioned for the following alternative method to 30 C.F.R. § 77.501:

(a) A certified electrician shall be designated to disconnect electricity, visually observe to determine that the connecting devices on high voltage circuits are in open position, lockout the disconnect where possible, tag the disconnection device, and test to assure proper disconnection and ground.

(b) The designated certified electrician will make personal, verbal contact with all work areas involved to inform the workers that power has been disconnected per item (a) above and that circuits or equipment are ready to repair. Notification will be by either radio, intercom, or in-person communication. No work will be performed at the work area until this communication has been received by (i) the certified electrician, if electrical work is being performed, or (ii) the designated person responsible for performing maintenance work. There may be occasions when maintenance work will be performed and the equipment will need to be deenergized but a certified electrician may not be required or present at the work site if only maintenance work is being performed. In either case mentioned above, no work at the work site will be performed until the designated person at the work site repeats back to the designated certified electrician at the power source and receives verification that the power is deenergized. Each electrician or maintenance worker, as the situation may apply, will be assigned a personal radio call number. If only one certified electrician is employed on any given shift and electrical work has to be performed, this variance does not

apply and ICG must comply with the provisions of 30 C.F.R. § 77.501.

(c) As an extra precaution, each member of the repair team, once he/she has received confirmation that work may begin, shall test all circuits appropriate to their task to insure power is disconnected and shall ground such circuits before work will begin.

(d) When all work on the de-energized circuit has been completed, and prior to energizing the circuit, the designated electrician shall contact the person(s) in charge of each work area served by such circuit for confirmation that (i) work is completed, and (ii) that everyone is clear of any recognizable electrical hazard that could result from re-energizing. The designated certified electrician may remove the lock only after each person(s) in charge of each work area(s) has responded in the manner prescribed herein to the designated certified electrician and has confirmed that everyone in the work area(s) of that/those person(s) is clear.

(e) Immediately prior to actually restoring power, the designated certified electrician will again communicate in the manner set forth herein that power is about to be restored.

(f) Upon re-establishing power, the designated certified electrician will stand by at the disconnect and be prepared for emergency disconnect, if needed. Upon re-energizing power circuits, each person(s) in charge of such work area(s) shall report the status of their work area to the designated certified electrician, and only after receiving confirmation from such person(s) in charge that all is well, may the designated certified electrician leave the disconnect and consider the assignment completed.

(g) This procedure will be reviewed with all employees in a safety meeting prior to the implementation. A copy of these stipulations shall be posted at the mine site.

(h) Clear, direct communications shall be required at all times. Only to the extent that the information, orders or instructions required herein are communicated between the

designated certified electrician and the person(s) in charge of the work area(s), and confirmed, shall work proceed.

In support of its alternative method, ICG asserts the following:

(1) At ICG Eastern's surface mine, the disconnecting devices for the mining equipment is typically located several miles away from the mining equipment itself. Thus, certified electricians must travel back and forth between the power station and equipment to perform inspections and repairs. Due to the physicality and layout of ICG Eastern's worksite, complying with the black letter of this standard would be unduly burdensome and inordinately time consuming.

(2) This method and procedure [as laid out above] for working on electrical equipment was approved on September 14, 1998 by the West Virginia Coal Mine Safety and Technical Review Committee as an alternative to the application of WV Surface Mine Regulations, Title 56-3-37.1(a), which have similar safety requirements to 30 C.F.R. § 77.501. Since that time, ICG Eastern has followed the above-described procedures when working on electrical equipment and has not suffered any injuries or fatalities as a result of accidental electrocution.

(3) This alternative method will, at all times, guarantee no less than the same measure of protection from the potential hazards of accidental electrocution against which 30 C.F.R. § 77.501 was intended to guard.

(4) This method is similar to the Program Policy Manual's comments on 77.704-1 for removing power from high voltage lines to be repaired when disconnects are some distance away. The Manual recognizes that a second electrician removes and locks out power and then notifies the other electrician when power has been removed and it is safe to make repairs.

(Joint Exhibit 3)

## **II.**

Petitions for modifications are governed by § 101(c) of the Act. Section 101(c) provides in pertinent part:

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine...

Thirty C.F.R. § 44.4 is the regulation implementing § 101(c). It provides:

(a) A petition for modification of application of a mandatory safety standard may be granted upon a determination that—

(1) An alternative method of achieving the result of the standard exists that will at all times guarantee no less than the same protection afforded by the standard, or

(2) Application of the standard will result in a diminution of safety to the miners.

ICG, as a party seeking a modification of a mandatory safety standard, has the burden of proof by a preponderance of the evidence. 30 C.F.R. § 44.30. ICG must show that having one electrician lock out and tag the disconnecting device while a second electrician performs repairs on the dragline achieves the same level of protection as afforded the miners as the mandatory safety standard of 30 C.F.R. § 77.501.

Specifically, ICG maintains that (1) the proposed decision and order ignores the fact that ICG had no accidents, communication problems, or “near misses” when utilizing the TRC waiver method, (2) the March 13, 2006 accident at the Birch River mine was wholly unrelated to the process outlined in the Petition, (3) similarly situated operators in West Virginia have been granted TRC waivers that have been implemented without incident, and

(4) in similar circumstances, MSHA allows electricians to work in tandem to remove power on high voltage lines.

### **III.**

In relevant part, Section 101(c) of the Mine Safety Act authorizes modification of a safety standard at a particular mine when it is determined that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard. 30 U.S.C. § 811(c). This provision calls for a two-step analysis of any proposed modification.<sup>1</sup> See *UMWA, International Union v. MSHA*, 928 F.2d 1200 (D.C. Cir. 1991).

The first step, corresponding to Section 101(c)'s "result" clause, requires a finding that the proposed alternative method will promote the same safety goals as the original standard with no less than the same degree of success. The second step, keyed to Section 101(c)'s "same measure of protection" requirement, contemplates a more global inquiry into the net safety effect of the modification. Taking into account both advantages and disadvantages of the alternative method, including effects unrelated to the goals of the original standard, the effect on overall mine safety must be considered. Within these directives, I find that the Administrator must review the specific circumstances of each case when reviewing a petition for modification. See 30 U.S.C. § 811(c); see also *International Union, UMWA v. Federal Mine Safety and Health Admin.*, 924 F.2d 340, 343 (D.C. Cir. 1991).

#### ***The "Result" Clause***

ICG contends that the Administrator's decision to reject the alternate method is unfounded because such a proposed method at all times guarantees no less than the same measure of protection afforded the miners under § 77.501. To determine whether ICG has met their burden of proof by a preponderance of the evidence, the entire record must be carefully examined.

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<sup>1</sup> Specifically, the court in *International Union, UMWA v. MSHA*, 928 F.2d 1200 (D.C. Cir. 1991) discussed the analysis that MSHA must undertake in its application of the second inquiry of § 101(c). The court held that the Assistant Secretary must make distinct findings on whether, considering all of the effects of the proposed alternate method, both positive and negative, modification would achieve a net gain, or at least equivalency, in overall mine safety. Thus, the Administrator must inquire into the net safety effect of the proposed alternate method.



ICG's predecessor to the Birch River Mine, Evergreen Mining, was granted a waiver by the State of West Virginia in 1998 identical to the waiver presently at issue, and operated under that waiver for eight years. Similar methods of compliance have been in use at surface mines in West Virginia by virtue of variances granted by the State of West Virginia for over 10 years. (ICG E-1, Joint E-2). Evergreen Mining's application for the state waiver was based on a request with identical terms submitted by Hobet Mining, Inc. that was approved by West Virginia in 1996. (ICG E-1). In granting Hobet's request, TRC expressly stated: "We feel that safety is not lessened by allowing a different electrician, other than the one performing the work, to lock and tag power circuits as long as adequate communication is maintained between the two electricians." *Id.*

In the eight years that ICG has been operating under their state variance, ICG suffered no electrical accidents while operating under the terms of the waiver. (Transcript of Hearing at 44). Furthermore, the electrical shock injury that led to MSHA's investigation of the Birch River Mine did not occur while operating under the TRC waiver. (Tr. 50). In fact, James Honaker, MSHA's own expert witness and investigator of ICG's petition for waiver, admitted under cross-examination at hearing that had the employees of ICG been following the provisions of the TRC waiver at the time of the incident, the subsequent injury would have been avoided. (Tr. 165).

Eugene Brown testified at hearing for the petitioner, and I find his testimony to be persuasive and credible. Brown is employed by ICG at the Birch River Mine in the capacity of Safety Manager. (Tr. 25-26). He has 34 years of experience in the coal mine industry. (Tr. 26). At hearing, Brown testified that, in his opinion as Safety Manager, ICG's proposed method is actually safer than the method laid out in 30 C.F.R. § 77.501. (Tr. 61, 63). The dragline can sometimes be located over two miles from the substation. (Tr. 99-100). This would require an electrician operating under the terms of § 77.501 to travel four miles round-trip in order to lock out and tag the disconnecting device, travel to the dragline, perform repairs, then travel back to the substation to restore power. This process is extremely inefficient and, according to Brown, can lead to an electrician becoming overly fatigued or distracted to effectively and safely perform his job. (Tr. 60). Under ICG's proposed alternate method, which has been in use by electricians at the Birch River Mine for eight years, two certified electricians would perform repairs on the dragline. One would lock out and tag the disconnecting device in the substation, and alert the second electrician at the dragline via radio. The second electrician would perform the necessary repairs, clear the dragline, then radio back to the first electrician to restore power.

MSHA argues that communication via radio can lead to miscommunication and thus to electrical accidents. However, MSHA fails to acknowledge the fact that the Birch River Mine has used this form of radio communication to repair electrical problems on the dragline for eight years with no incidence of miscommunication or electric shock injury. MSHA additionally finds fault with the fact that the radio channel used for these types of repairs is not an electrician-only channel, but instead is a channel used for the entire dragline crew. (MSHA Post-Hearing Brief at 10). This concern does not carry much weight. The entire dragline crew consists of only five workers, which is not enough to "clog" the channel and lead to miscommunication. The workers who tune to the dragline channel utilize a "business only" policy, so there is never idle conversation interfering with important communications. (Tr. 108, 115). Both Eugene Brown and Steven Cogar, a certified electrician for ICG, testified at hearing that in their experience there have been no incidents of interference when communicating via radio. (Tr. 44-45, 96). The electricians at ICG use handheld Motorola FM radios when operating under the TRC waiver. (Tr. 53). These radios have a range of several miles and allow for clear communication. *Id.* Furthermore, it makes sense that when the dragline is under repair, especially repair of an electrical nature, that the entire dragline crew be in communication with one another. It seems that maintaining the entire crew on the same channel during electrical work would increase the safety of the crew, not lessen it.

To support the argument that having one electrician disconnect and lock out the power source while a second electrician conducts repairs is a dangerous practice, MSHA has submitted into evidence two investigative reports regarding electrical accidents at other mines. (MSHA E-3 and 4). In both cases, a coal mine worker suffered a fatal electric shock when working on equipment that he himself had not disconnected. However, neither of these accidents involved dragline repairs, and neither team of workers was employing a tandem communication system similar to the one ICG has proposed in this case. In the first accident, the disconnecting electrician had failed to lock out the disconnecting device, place a suitable tag on it or attach a grounding device to the disconnected portion. (MSHA E-3). Additionally, the victim was not a qualified electrician and had not received an annual electrical "refresher training" for 19 years. *Id.* Similarly, the second accident was caused when a worker, working quickly due to a non-operational ventilation system, failed to take the time to disconnect or lock and tag the device on which he was working. Neither of these accidents would have occurred under the alternative method proposed by ICG. These fatalities were caused by carelessness and a complete failure of communication between the worker in charge of disconnecting the electricity and the worker performing the repairs. In neither case were the electricians

working in tandem via radio communication. In fact, if the mine workers in these two examples had been properly using a system like the one proposed by ICG, the fatalities would not have occurred.

Under ICG's proposed alternative method, certified electricians would still be performing all aspects of electrical repairs. One certified electrician would lock out and tag the disconnecting device in the substation, while a second certified electrician would make the repairs to the dragline. The electricians at the Birch River Mine have received extensive training in the waiver method, and receive refresher training on the method at their annual retraining. (Tr. 92). Having two certified electricians work in tandem via radio seems to actually be safer than MSHA's method as laid out in § 77.501, by virtue of the fact that there would always be a certified electrician on site at the dragline when power is restored following repairs. This way, if there is a dangerous electrical condition caused by the restoration of power, a certified electrician is at the location of the problem to ensure the safety of the dragline workers and to inform the substation electrician that power must be immediately disconnected.

In any situation where the safety of a worker is at issue, the opinions of those workers are important. In the present case, the union has not entered the proceedings as a party and has offered no opinion on the waiver method. However, the certified electricians at the Birch River Mine fully support the waiver method. (Tr. 65, 108-109). The fact that the workers directly affected by this petition support the alternative method, while not being dispositive of the issue, is persuasive and should be given weight.

Finally, ICG's use of the "kirk key" system is an added safeguard that goes above and beyond the requirements of § 77.501. The kirk key is a device that is unique to each individual electrician, and is used to lock out the disconnecting device. (Tr. 64-65, 97). Without the specific kirk key that was used to deenergize the dragline, power cannot be restored. This system further ensures the safety of the mine workers against accidental electrical shock, because only the electrician put in charge of disconnecting the power can reengage power to the dragline. This dramatically reduces the chances that a mine worker will suffer electrical injury due to premature or accidental reenergization of the dragline.

### ***The "Same Measure of Protection" Requirement***

The "same measure of protection" step of Section 101(c) requires a more global inquiry into the net safety effect of the modification. The overall effect on mine safety, based on both the advantages and disadvantages of

the proposed alternative method, must be weighed. In the present case, the petitioner's proposed alternative method will have little effect on overall mine safety. Any effect it does have will be positive—the electricians working on the dragline will be safer and will suffer from less fatigue and stress.

I conclude that all of the effects of the alternative method, both positive and negative, will achieve at least the same in overall mine safety. Upon careful and meticulous consideration, I find that, at all times, no less than the same measure of protection afforded the miners under 30 C.F.R. § 77.501 will be guaranteed by allowing the Birch River Mine to operate as proposed in ICG's petition for modification.

### **ORDER**

On detailed consideration of the petition for modification, including testimony relating to such petition, considering both positive and negative effects of the alternative method, and upon evaluation of the evidentiary record, the undersigned has determined that the alternative method proposed by the petitioner will at all times achieve net gain or at least equivalence in overall mine safety no less than the same measure of protection afforded by the standard.

Pursuant to Section 101(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 811(c), it is **ORDERED** that ICG's Petition for Modification of the application of 30 C.F.R. § 77.501 in the Birch River Mine is hereby:

**GRANTED**, conditioned upon compliance with all provisions of the Petitioner's alternative method and the terms and conditions Petitioner stipulated to at hearing.

**SO ORDERED.**

A

William S. Colwell  
Associate Chief Administrative Law Judge

Washington, D.C.  
WSC:LW

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Notice of Appeal ("Notice") with the Assistant Secretary of Labor for Mine Safety and Health within thirty (30) days after service of the "Initial Decision" of the Administrative Law Judge. See 30 C.F.R. § 44.33(a). The Assistant Secretary's address is: Assistant Secretary for Mine Safety and Health, U.S. Department of Labor, Room 2322 TT#2, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Assistant Secretary.

At the time you file the Notice with the Assistant Secretary, you must serve it on all parties. See 30 C.F.R. §§ 44.6 and 44.33(a). If a party is represented by an attorney, then service must be made on the attorney. See 30 C.F.R. § 44.6(c).

If no Notice is timely filed, then the administrative law judge's "Initial Decision" becomes the final decision of the Secretary of Labor. See 30 C.F.R. § 44.32(a).